SEPARATE OPINION OF DALE C. CHRISTENSEN, JR.

The Miller campaign has properly sought guidance from this Board on issues related to the exemption from relevant campaign expenditure limits of: 1) petitioning expenses (which included literature distribution) incurred by them in connection with the Democratic primary; and 2) petitioning expenses (which included literature distribution) incurred in connection with getting a new party on the ballot for the general election.

Governance of such petitioning processes is essentially a matter of state law. For example, state law proscribes the precise time frames for petitioning to get on the ballot of the Democratic Party (i.e., June 7 to July 14) and for adding a new party to the ballot for the general election (i.e., July 12 to August 23).

There is no issue raised here that the Miller Campaign did anything at variance with state law. It did not. Rather, the guidance sought by the Campaign is a consequence of this Board's oral decision of September 1 in the Stephen Kaufman matter, which found that the expenses of distributing literature in connection with the petitioning process there was not exempt from the primary expenditure limits applicable to the Kaufman campaign. The essential factual premise on which that holding was founded was that the Kaufman campaign had described in its disclosure statements that it had expended funds for both the "distribution" of literature and "petitioning."

In light of the further elucidation of the law prompted by the Miller Campaign request for guidance, it is this Board Member's view that the Kaufman decision was wrongly decided or, at the very least, should be limited to the essential distinctive facts presented there.

After a thorough review of the decisions, rules and applicable law submitted by both the CFB staff and the Miller Campaign, I am compelled to conclude that that there is

no prior rule or decision directly on point rendered by this Board, nor statute enacted by the legislature that can reasonably be construed to have defined as non-exempt the distribution (as contrasted with the printing) of literature used in the petitioning process. Arguments to the contrary do not withstand scrutiny.[1] They also have the wholly unfair effect in the absence of a clear holding of changing the rules in midstream

Consequently, if the distribution of literature was done as an integral part of the petitioning process, then the expenses of that distribution must be exempt. Campaigns such as Miller's which made a careful effort[2] to effect compliance by the petitioners with the law are entitled in the absence of clear precedent to deem the distribution of such literature as an exempt expenditure.

As a consequence, this Board in my view must recognize as exempt the distribution of literature used in connection with a petitioning process. If it is determined that this is an area for refinement or new legislation, that can only be fairly done prospectively, not in the middle of an election campaign.

With regard to the timing of the Miller Campaign's petitioning expenses, the record is not troubling, since it accorded with the time frame prescribed by state law.

Regarding the amount spent petitioning, on the record before us, this Board knows that about $197,083 was spent on petitioning expenses up to July 11, 2005, and $613,424 was spent thereafter. In fact, some of the post July 11 money may be allocable to the Primary, as that petitioning continued for three more days, to July 14. The new party petition effort for the general election began on July 12, but overlapped for three

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[1] The Handbook's statements regarding the non-exempt status of campaign literature can be interpreted either way. The Board's actions in the Hevesi Campaign matter, likewise are subject to different interpretations. What is clear is that there is no plain statement saying that the "distribution" of campaign literature in the petitioning process renders the time incurred in connection with that distribution as non-exempt. Mere arguments cannot be the basis for enforcement by this Board and it seems just that campaigns were entitled to rely on the conclusion that they could safely distribute literature in connection with the petitioning process and characterize that distribution as non-exempt.

[2] See letter of MFNY dated September 2, 2005 pages 3 to 6.

days. The number of executed petitions filed for the primary numbered 158,000, and the number of petitions for the general election's new party registration ranged from 50,000 to 94,500 by estimates of Board staff. We are also told that 7,500 signatures were required for each petition effort.

It is this Board member's view that while multiples of the signatures required may be evidence of campaigning that should be non-exempt, this Board cannot fairly choose at this juncture to make law on what is an appropriate multiple (e.g., the Ferrer campaign got 100,000 signatures for the primary). State Law sets no maximums. Moreover, This Board has never before opined on this issue and should not do so now after the fact and in the eleventh hour of a campaign.

We are also told that multiples are required to defend challenges to the signatures and we are in no position at this time to say what multiple is too high, even if it is a proper basis for future prospective Council or Board action.

The Board admittedly has the ability however to evaluate the reasonableness of the size of any group of exempt expenditures.

Thus the total number of petition expenditures incurred by the Miller campaign in the primary petition process (a number somewhat above $197,083) is likely properly exempt based on the analysis discussed here.

The issue is more complicated in the context of the general election's new party petition. First, if, as reasonably expected, the victorious primary winner's campaign were ultimately to be against a non participant in the CFB program, there would be no expenditure limit and whether the expenditure were exempt or non-exempt would not matter. The new party petitions are intended to get Miller on the ballot for the general election on more than one party line. His opponent in a general election is already likely to have more than one party line. Thus, the petitioning itself for a new party line and the

ultimate amount spent would likely not matter as a matter of law, since there would be no expenditure limit in the general election.

The only basis on which such expenditures can be challenged as non-exempt is whether their monetary size demonstrates that they were fundamentally designed to advantage the Miller campaign against his primary opponents, as opposed to his likely non-participating opponent in the general election. In that case, some of the expenditures for new party petitioning might possibly be deemed to be for the benefit of the primary campaign and would have to be returned and reallocated to that campaign's primary expenditure limit. In that instance the petition costs of the New Party would have to be allocated on some rational basis between the primary and general. The standard regarding the exempt status of literature distributed would still apply. The costs of printing such literature would, however, have to be reallocated to the primary campaign.

The record before this Board at this juncture does not permit us to make the necessary reallocation to the primary campaign at this time. Factors that would be important in triggering such a reallocation would include, inter alia, for example: the real value of another party line in a general election; the extent to which such a party line was promptly effectuated with the Board of Elections; the breadth of solicitation of new party signatures by party registration; and the lack of criticism of the positions of primary opponents in the literature, as opposed to the criticism of the positions of the likely opponent in the general election.

Dale C. Christensen, Jr.